

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS  
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF HAWTHORNE  
DEVELOPMENT, LLC**

Petitioner

Daniel Roach

Bill Vest

Scott Dunn

For the Petitioner

Robert Harris, Esquire

Elizabeth C. Rogers

Attorneys for the Petitioner

\*\*\*\*\*

Dan Wilhelm

Greater Colesville Civic Association

Supporting the Petition

\*\*\*\*\*

Before: Lynn A. Robeson, Hearing Examiner

\*

\*

\*

\*

\*

\*

\*

\*

\*

\*

\*

\*

\*

\*

\*

\*

Board of Appeals Case No. S-2882  
OZAH Case No. 15-07

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

<b>I. STATEMENT OF THE CASE .....</b>	<b>2</b>
<b>II. FACTUAL BACKGROUND.....</b>	<b>3</b>
<b>A. The Subject Property.....</b>	<b>3</b>
<b>B. The Surrounding Area.....</b>	<b>5</b>
<b>C. The Proposed Use.....</b>	<b>7</b>
<b>1. Site Plan.....</b>	<b>8</b>
<b>2. Operations.....</b>	<b>11</b>
<b>3. Landscaping and Lighting .....</b>	<b>11</b>
<b>4. Parking, Access and Circulation .....</b>	<b>12</b>
<b>5. Signage.....</b>	<b>16</b>
<b>D. The Master Plan .....</b>	<b>16</b>
<b>E. Environment .....</b>	<b>17</b>
<b>F. Adequacy of Public Facilities .....</b>	<b>18</b>
<b>III. SUMMARY OF TESTIMONY .....</b>	<b>19</b>
<b>IV. FINDINGS AND CONCLUSIONS .....</b>	<b>20</b>
<b>A. Standard for Evaluation.....</b>	<b>20</b>
<b>B. General Conditions .....</b>	<b>22</b>
<b>C. Specific Standards.....</b>	<b>27</b>
<b>D. Additional Applicable Standards .....</b>	<b>30</b>
<b>V. RECOMMENDATION.....</b>	<b>33</b>

## I. STATEMENT OF THE CASE

Petition No. S-2882, filed on October 27, 2014, seeks a special exception under §59-G-2.37 of the 2004 Zoning Ordinance to permit a 155-bed domiciliary care facility for the elderly on property in the R-200 (Residential, one-family) Zone.<sup>1</sup> The property is located at 13716 New Hampshire Avenue, Silver Spring, Maryland.

On November 21, 2014, the Board of Appeals issued notice of a hearing scheduled for April 3, 2015. Exhibits 23. After the notice was issued, the Petitioner requested a postponement of the hearing to June 5, 2015, stating that changes to the petition had been made in response to comments from Staff and members of the community. On April 1, 2015, OZAH issued a notice rescheduling the hearing to June 15, 2015, as well as a Notice of Motion to Amend the Petition after the Petitioner filed revised plans. Exhibits 24, 28. Staff of the Montgomery County Planning Department (Technical Staff or Staff) recommended denial of the petition in its Staff Report dated May 8, 2015, because the “size, scale and bulk” of the building was incompatible with the neighborhood. At the Petitioner’s request, the Planning Board deferred its recommendation to give the Petitioner the opportunity to modify the Petition. Exhibit 33.

In August, 2014, the Petitioner filed a request to reschedule the public hearing on October 19, 2014, along with a revised site plan. Exhibits 41. The Hearing Examiner issued notice of the rescheduled hearing as well as notice of Petitioner’s Motion to Amend the application. Exhibit 43. Staff issued a report recommending approval of the revised plan subject to nine conditions. Exhibit 48. Upon review, the Hearing Examiner requested additional information from Staff regarding the character of the area and the number and type of special exceptions in the defined neighborhood.

---

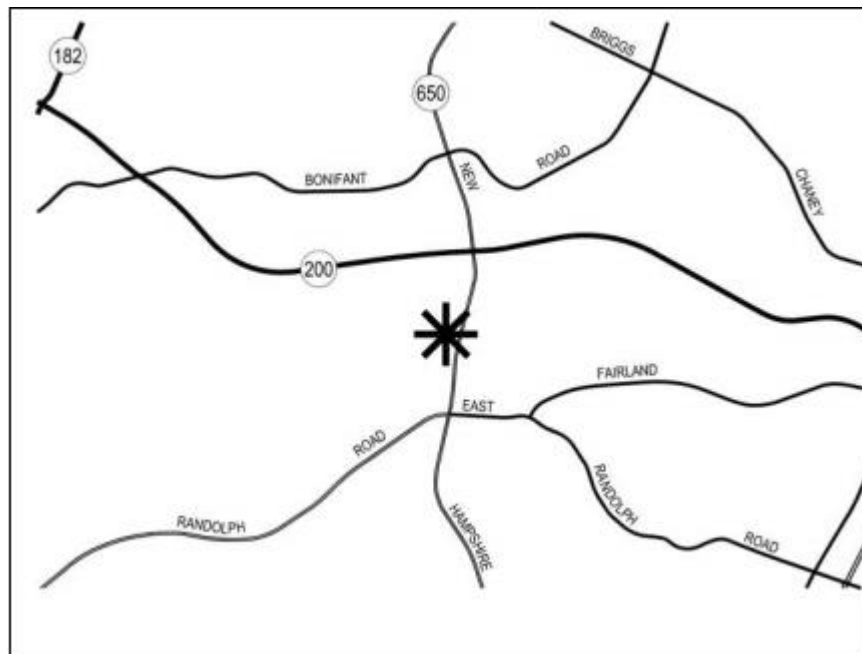
<sup>1</sup> Because the petition was filed before the effective date of the 2014 Zoning Ordinance (which was October 29, 2014), it may be reviewed under the procedures and development standards of the 2004 Zoning Ordinance. *See, 2014 Zoning Ordinance*, §59-7.7.1.B. All citations to the “Zoning Ordinance” in this Report refer to the 2004 Ordinance unless otherwise noted.

Exhibit 47. The Planning Board recommended approval subject to the conditions recommended by Staff. Exhibit 49. At the public hearing, the Petitioner submitted a list of the special exceptions within or near the surrounding area. Exhibit 53. The Hearing Examiner left the record open until October 29, 2015, to receive Staff's supplemental analysis. Staff submitted its analysis on October 20, 2015 (Exhibit 57), and the record closed on October 29<sup>th</sup>, as scheduled. The Hearing Examiner re-opened the record on November 9, 2015, solely to copies of the special exception site plan, landscape plan, and other plans that had not been sealed by the engineer, and the record closed immediately thereafter. Exhibits 58 through 61.

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property**

The subject property is located on the west side of New Hampshire Avenue, approximately mid-way between the Inter-County Connector and Randolph Road. A vicinity map showing the general location of the property is below (Exhibit 48):



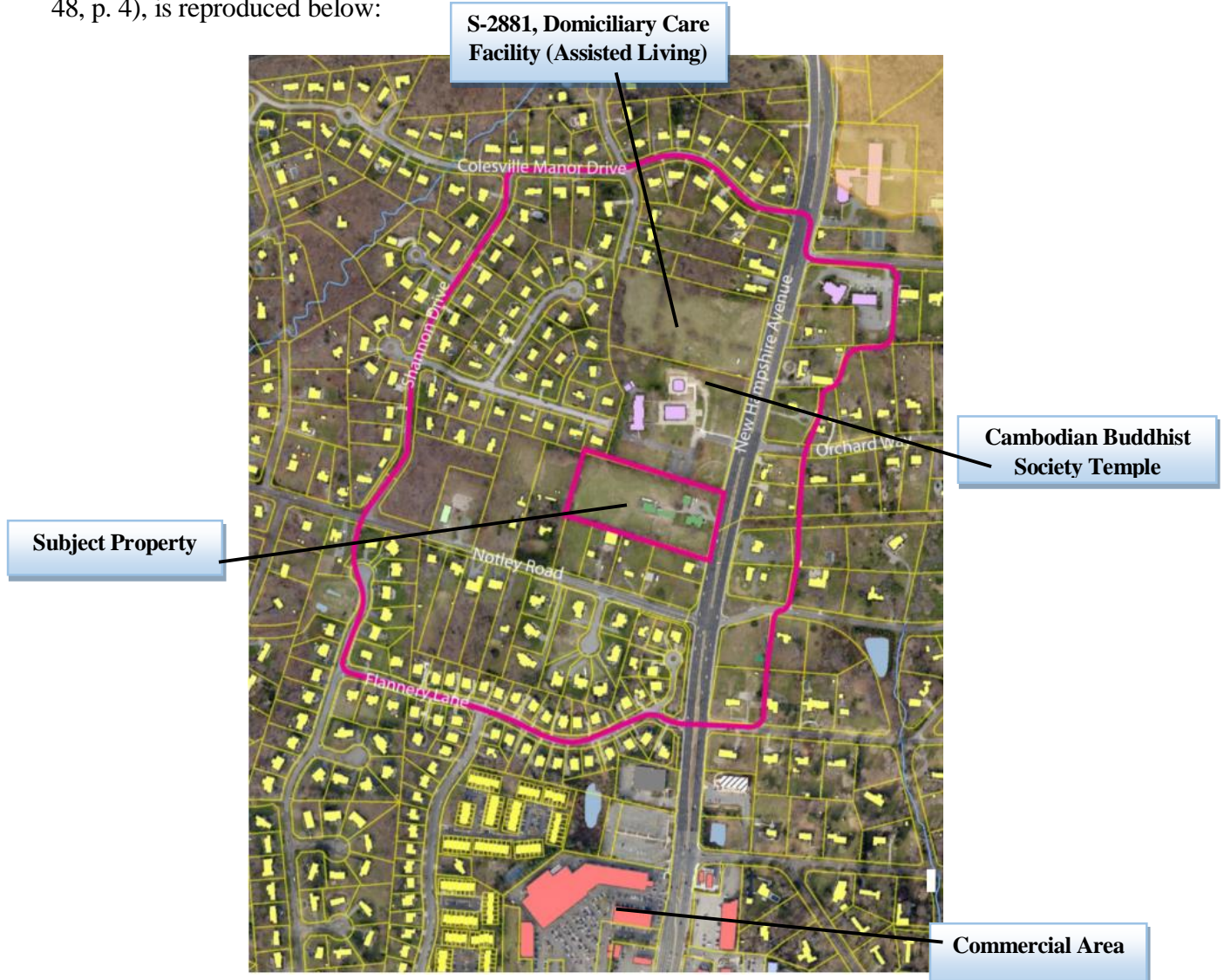
The property is rectangular in shape and contains approximately 4.6 acres. Staff advises that the end abutting New Hampshire Avenue is approximately 295 wide; the property extends to a depth of 731 feet. While the property is within both the Paint Branch and Northwest Branch Watersheds, it is outside any special protection areas. Exhibit 48, p. 3. Mr. Bill Vest, the Petitioner's expert in civil engineering, testified that the property falls 22 feet from west to east. T. 50. Currently, the property is improved with a single-family detached dwelling used for a business. It has a limited movement access (i.e., right-in, right-out) on New Hampshire Avenue due to a median dividing the six lanes along the property's frontage. An existing sidewalk, not to current standards, runs along the property frontage on New Hampshire Avenue. An aerial photograph from the Staff Report (Exhibit 48, p. 3), showing the property outlined in red, is below:



## B. The Surrounding Area

Compatibility of the special exception is generally determined with reference to those properties that will be directly impacted by the proposed development. The area that will be impacted, or the “surrounding area or neighborhood” is defined and then characterized in order to determine whether the special exception will be compatible with the area.

Staff defined the “surrounding area” as bordered by Colesville Manor Drive to the north, the lots fronting the eastern side of New Hampshire to the east, Flannery Lane to the south, and Shannon Drive to the west. A graphic showing the boundaries of the area, included in the Staff Report (Exhibit 48, p. 4), is reproduced below:



There are two special exceptions in the surrounding area, a related domiciliary care facility for assisted living (Board of Appeals Case No. S-2881), also developed by Hawthorne, and an accessory apartment (S-1367). Exhibit 53. The property adjacent to the north is improved with the Cambodian Buddhist Society temple. In its supplemental Analysis, Staff defined the character of the neighborhood as (Exhibit 57):

The predominant characteristic of the neighborhood is one that features a variety of mostly institutional and other non-residential uses housed in low-rise buildings along both sides of New Hampshire Avenue with some low-density residential uses located between the institutional and non-residential uses but mostly concentrated behind them.

Mr. Daniel Roach, the Petitioner's expert in land planning and architecture, testified that that New Hampshire Avenue is a six-lane divided highway and is a major transportation corridor for the area. There is direct access to the Inter-County Connector to the north and Randolph Road is to the south. T. 14. Most of the homes fronting on New Hampshire have been converted to small businesses and most of the access points for newer residential subdivisions are perpendicular to New Hampshire, with other roads that then branch out to create the neighborhoods. There is a major commercial district with full service retail (e.g., franchise restaurants, gas stations, etc.) outside of the neighborhood to the south. To the north, New Hampshire Avenue is lined with churches of all sizes. Hawthorn's assisted living facility (approved in BOA Case No. S-2881) is located just on the other side of the Buddhist temple. T. 14-15. He opined that the uses directly abutting New Hampshire Avenue are generally non-residential, with the residential neighborhoods tucked in behind. T. 15. The adjacent property to the south is improved with a "hobbyist garage" where the owners repair automobiles. An accounting business is currently located on the subject property. T. 16.



Based on this evidence, the Hearing Examiner characterizes the area as primarily institutional or non-residential along New Hampshire Avenue, with single-family detached communities immediately behind the properties fronting on New Hampshire Avenue.

### **C. The Proposed Use**

Mr. Roach testified that the Petitioner, Hawthorn Retirement Group, has been involved in senior housing for approximately 30 years. The Petitioner requests approval of an independent or congregate care facility, which provides what he calls “Friday night services,” or the lifestyle you would want to have on a Friday night. The next level of care is provided by an assisted living or memory care facility, which is the service offered in the facility approved in Board of Appeals Case No. S-2881. The services provided in S-2881 are complementary to the independent living facility; individuals may be overserved in assisted living and wish to live in the type of facility proposed here, or they may need more assistance and wish to have a higher level of care. T. 11-13.

In its original application, the Petitioner proposed a 135,000-square foot, four-story building with 148 suites and 161 beds. Planning Staff recommended denial of that application because the bulk and scale of the project was incompatible with the character of the area. Exhibit 32, p. 1. At the Petitioner’s request, the Planning Board deferred the petition, and the scale and bulk of the building have been significantly reduced.

The most recent site plan (Exhibit 61(a)) shows 141 suites with a maximum of 155 beds. The floor area ratio has been reduced to 131,000 square feet and the height of the elevation facing New Hampshire has been lowered from four to three stories through re-grading and lowering the first floor. This reduced the height of that wing by 21 feet. Exhibit 48, p. 5. Elevations demonstrating the difference between the original proposal and the current proposal (Exhibit 48., p. 10) are shown on the following page.



**Exhibit 48, p. 10**

### 1. Site Plan

The building will be approximately 408 feet by 160 feet wide. The front wing facing New Hampshire is 149-feet in width and 37 feet (or three stories) in height. A sidewalk connects the entrance to an existing sidewalk along New Hampshire Avenue as well as a 15-foot walking path that circles to the northern property. The sidewalk also extends to the rear of the building, where a bocce court and courtyard are located. Exhibit 42(a). The Petitioner plans to improve the existing substandard sidewalk along New Hampshire Avenue, by providing a 10-foot wide shared-use path, recommended as a condition of approval by Staff. Exhibit 48. The generator is located along the northern property line and the trash receptacle is located at the southwest corner, close to garage parking for vans. The architectural site plan proposed (Exhibit 42(c)) is shown on the next page.

The engineered site plan, which is the approved site plan, is shown on page 10.





**Engineered Site Plan  
Exhibit 61(a)**

## 10-Foot Shared Use Path

## 2. Operations

Common areas are located in the center of the building on the main floor. These include the lobby, office, and manager units. The individual units do not have cooking facilities, and meals are provided in a congregate dining room adjacent to a commercial kitchen. A private dining room is available for visits from family or friends. Exhibit 48, p. 5. The largest work shift will have a maximum of 10 employees. *Id.* at 18. Trash removal will occur one to two times a week between the hours of 7:00 a.m. and 7:00 p.m. Food deliveries will occur in the afternoons. *Id.* at 15. Van service will be provided to transport residents to various locations in the area.

Approximately 25% of the residents will drive a vehicle on a daily basis; a large proportion of the staff/visitor-generated traffic will occur in off-peak hours. Exhibit 48, p. 15. The facility will employ a total of 35 people, 18 of which will be full-time. A typical work shift will have 8 employees; Staff recommends that the maximum employees on the premises at any one time should be 10 employees. *Id.* at 5.

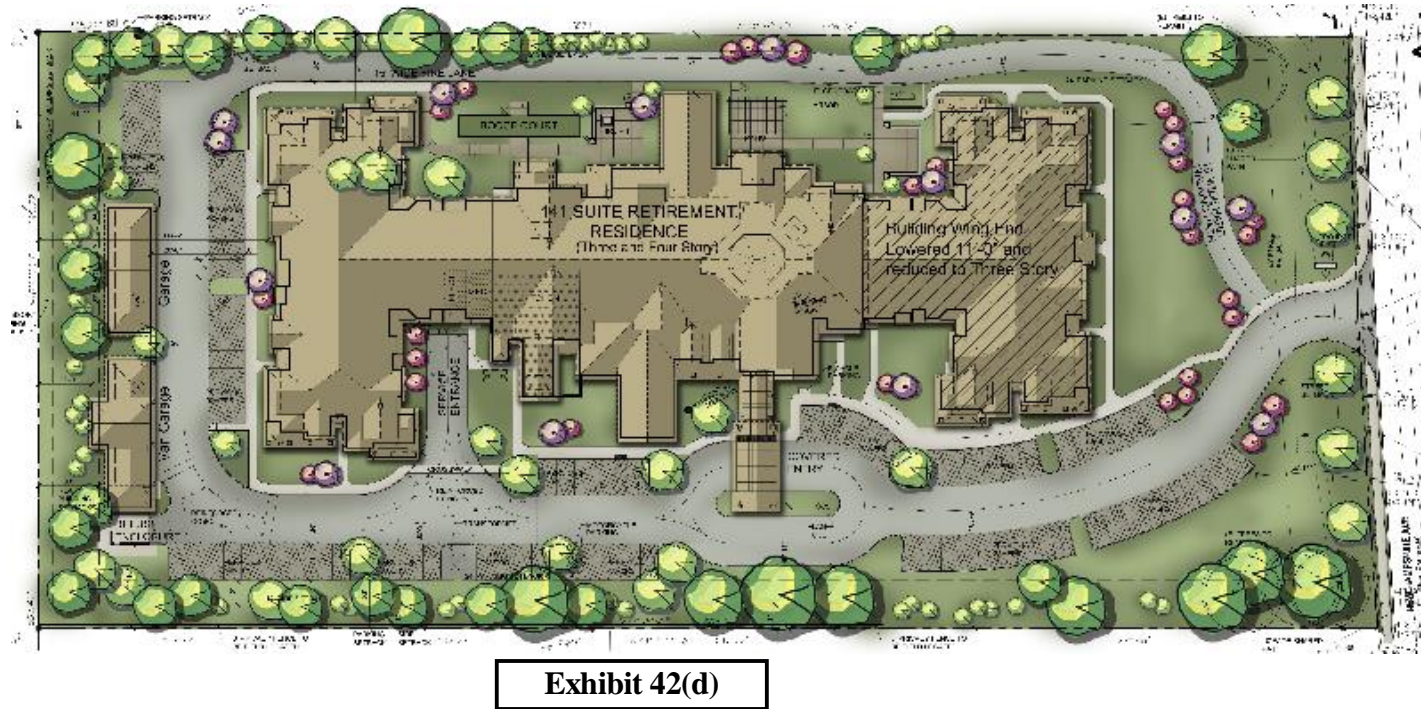
## 3. Landscaping and Lighting

Mr. Roach testified that the southern property line will be screened by a wooden fence and evergreen trees that will be 8 to 10 feet tall at planting.<sup>2</sup> The parking areas will meet all shading and screening requirements, he opined. T. 26. There are some trees along the northern property line that are substantial, and they will remain. T. 28. Staff concluded that the evergreen trees along the southern property line will provide a “dense screening” of the parking area from adjacent properties. A rendered site plan showing the illustrating the landscaping (Exhibit 42(d)), is reproduced on the following page. The detailed landscape plan (Exhibits 42(j) and (k)) is shown page 13.

---

<sup>2</sup> The site plan (Exhibit 42(b)) contains a reference to a 6-foot *vinyl* privacy fence along the southern property line. At the public hearing, Mr. Roach testified that it would be a wooden fence. T. 25. The Hearing Examiner includes a condition requiring a wooden, rather than vinyl, fence to avoid any confusion.



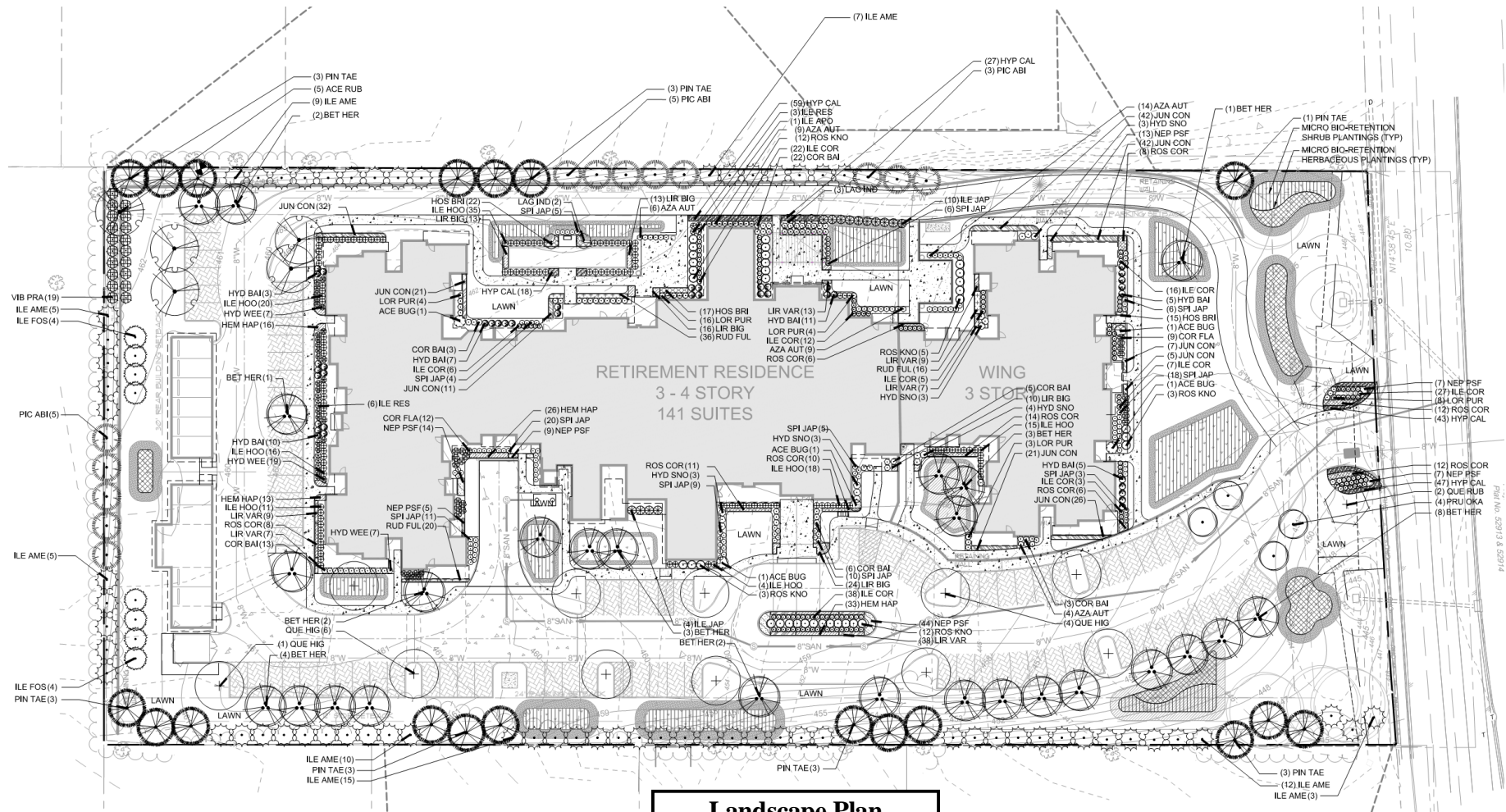


Mr. Roach testified that lighting fixtures have full cut-offs. In the parking lot, pole lights will be from 12 to 14 feet tall; he opined that these will not wash the building in light because they direct light downward. Exhibit 42(c)(c)(9); T. 22. The Petitioner submitted a photometric study (Exhibit 42(c)(9)) indicating that illumination at the property lines will be 0.0 footcandles. T. 24.

#### 4. Parking, Access and Circulation

The site plan includes 93 parking spaces, many of which along the southern property line are of pervious materials, 6 bicycle spaces, and 2 motorcycle parking spaces. Exhibit 42(c). A private minibus will be used to provide transportation for residents. Exhibit 48.

Because there is a solid median parallel to the site's frontage on New Hampshire Avenue, access is provided by a limited movement driveway (i.e., right-in, right-out) located approximately in the center of the property's frontage on New Hampshire Avenue. To enter the property, vehicles travelling northbound on New Hampshire Avenue must make a U-turn at a median break located at



**Landscape Plan**  
**Exhibit 59(i)**

PLANT KEY	
TREES	BOTANICAL NAME
ACE RUB	ACER RUBRUM 'OCTOBER GLORY' TM
BET HER	BETULA NIGRA 'HERITAGE'
QUE HIG	QUERCUS PHELLOS 'HIGHTOWER'
QUE RUB	QUERCUS RUBRA
EVERGREEN TREES	BOTANICAL NAME
ILE AME	ILEX OPACA
ILE FOS	ILEX X FOSTERI
PIC ABI	PICEA ABIES
PIN TAE	PINUS TAEDA
FLOWERING TREES	BOTANICAL NAME
ACE BUG	ACER PALMATUM 'BURGUNDY LACE'
LAG IND	LAGERSTROEMIA INDICA X FAUERI 'ACOMA'
PRU OKA	PRUNUS X OKAME
SHRUBS	BOTANICAL NAME
AZA AUT	AZALEA X 'AUTUMN ANGEL'
COR BAI	CORNUS SERICEA 'BAILEY'S REDTWIG'
COR FLA	CORNUS SERICEA 'FLAVIRAMEA'
HYD BAI	HYDRANGEA MACROPHYLLA 'ENDLESS SUMMER' TM
HYD WEE	HYDRANGEA QUERCIFOLIA 'PEE WEE'
HYD SNO	HYDRANGEA QUERCIFOLIA 'SNOWFLAKE' TM
ILE COR	ILEX CORNUTA 'CARISSA'
ILE HOO	ILEX CRENATA 'HOOGENDOORN'
ILE JAP	ILEX CRENATA 'STEEDS'
ILE APO	ILEX VERTICILLATA 'APOLLO'
ILE RES	ILEX VERTICILLATA 'RED SPRITE'
LOR PUR	LOROPETALUM CHINENSE 'PURPLE DIAMOND'
ROS KNO	ROSA X 'KNOCKOUT' TM
SPI JAP	SPIRAEA JAPONICA 'GOLDMOUND'
VIB PRA	VIBURNUM X PRAGENSE
GROUND COVERS	BOTANICAL NAME
HEM HAP	HEMEROCALLIS X 'HAPPY RETURNS'
HOS BRI	HOSTA X 'BRIGHT LIGHTS'
HYP CAL	HYPERICUM CALY CINUM
JUN CON	JUNIPERUS CONFERTA 'BLUE PACIFIC'
LIR BIG	LIRIOPE MUSCARI 'BIG BLUE'
LIR VAR	LIRIOPE MUSCARI 'VARIEGATA'
NEP PSF	NEPETA X 'LITTLE TRUDY' P.P. #18904
ROS COR	ROSA X 'CORAL DRIFT'
RUD FUL	RUDBECKIA FULGIDA SULLIVANTII 'GOLDSTURM'



the intersection of New Hampshire Avenue and the driveway to the Cambodian Buddhist temple (on the west side of New Hampshire). Orchard Way intersects New Hampshire Avenue on the east side. Vehicles exiting the property travelling north must first make a southbound right-hand turn and then a U-turn at Notley Road. Exhibit 48, p. 12-13. In response to concerns raised by the community, Staff analyzed the number of vehicles that would need to make U-turns at either intersection during the morning and evening peak hours, based on the percentage of trips travelling north and southbound (obtained from the most recent traffic counts from a segment of New Hampshire Avenue just north of Randolph Road). *Id.* Staff's conclusions are summarized in the table below:

	Cambodian Buddhist Temple/Orchard Way	Notley Road
Morning Peak Hour	4	2
Evening Peak Hour	4	6

Based on the number of trips making U-turns shown above, Staff concluded that there was sufficient storage in both left turn lanes to accommodate traffic making U-turns to enter and exit the property. *Id.*

In response to citizen's concerns regarding the lack of sufficient gaps in traffic to complete the U-turns, Staff consulted the Maryland State Highway Administration (SHA), who informed them that there were no operational or safety concerns relating to left turns on this stretch of New Hampshire Avenue. *Id.* Mr. Dan Wilhelm, a member of the Greater Colesville Civic Association who appeared at the hearing, testified that the amount of traffic on New Hampshire Avenue is minimal. He advises people to use U-turns coming out of the neighborhood because he believes it's much safer than trying to cross six lanes of traffic. T. 59-60.

## 5. Signage

The Petitioner proposes a sign near the entrance of the facility on New Hampshire Avenue, the location of which is shown on the site plan. Nothing in the record shows the sign's design, although Staff advises that it meets the requirements of Article 59-F of the Zoning Ordinance. Exhibit 48, p. 19.

### **D. The Master Plan**

The subject property lies within the *1997 White Oak Master Plan* (Master Plan or Plan). Exhibit 6. The Plan's overall goal is "to ensure livable communities for the future by protecting and strengthening their positive attributes and encouraging development that will enhance the communities' function, sense of place, and identity." *Plan*, p. 16. Because of the projected increase in population over 70 years of age, the Plan also encouraged providing elderly housing "along bus routes, and near shopping and public facilities." *Id.* at 66.

While there are no site specific recommendations for the property, the Master Plan does contain guidelines for special exceptions. These guidelines state (*Plan*, p. 24):

Excessive concentration of special exception uses and non-residential uses along major transportation corridors should be avoided. Sites along these corridors are more vulnerable to over-concentration because they are more visible. This is especially a concern along New Hampshire Avenue, Randolph Road, and Powder Mill Road.

To implement this overall goal, the Plan recommends four specific guidelines for approval of special exceptions (*Id.*):

- Require new requests for special exception uses along major transportation corridors and in residential communities to be compatible with their surroundings. Front yard set-back should be maintained.
- Avoid front yard parking because of its commercial appearance. Side and rear parking should be screened from view of surrounding neighborhoods.

- Require new buildings or any modification or additions to existing buildings to be compatible with the character and scale of the adjoining neighborhood.
- Avoid placing large impervious areas in the Paint Branch watershed due to its environmental sensitivity.

Staff concluded that the application was consistent with the Master Plan. Staff reasoned that the proposed development furthered the overall goal of the Plan because it permitted additional housing options within the area and because the Master Plan recognized the importance of providing senior housing in the area. Mr. Roach testified that, typically, new residents are in their 80's and have lived within 10 miles of the facility. T. 18. He also testified to the continuing need for elderly housing in the area. According to him, population data indicates that the need for senior housing is going to increase considerably. Hawthorn's market study identified nine facilities within seven miles of the subject property, all of which are from 90 to 100 percent full and with waiting lists. T. 18.

Staff also concluded that the revised site plan meets the Plan's specific guideline to reduce pervious areas in the Paint Branch Watershed because of the use of pervious pavers along the parking areas. Parking is located in the side yard, and as to the building's coverage, Staff found the use as "compact as it can be" for a project of this size. Exhibit 48, p. 9.

The *Intercounty Connector Limited Functional Master Plan Amendment* recommends a 10-foot wide shared use path along the west side of New Hampshire Avenue from Randolph Road to the Intercounty Connector. The Petitioner has agreed to provide this, and it is shown on the site plan (Exhibit 61(a)).

### **E. Environment**

Mr. Bill Vest, the Petitioner's expert in civil engineering, testified that Planning Staff has approved an NRI/FSD for the property. The site is not within a special protection area, nor are there

any forests, streams, wetlands, flood plains or environmental constraints. The Preliminary Forest Conservation Plan (PFCP) has been approved by the Planning Board. T. 52.

## F. Adequacy of Public Facilities

### 1. Transportation

Staff estimated that the facility would generate 15 trips during the morning peak hour and 17 trips during the evening peak hour, as summarized in the table from the Staff Report (Exhibit 48, p. 12), below:

**Table 1 - Trip Generation for Colesville Senior Housing Facility S-2882**

Land Use	Size	AM Peak Hour **			PM Peak Hour **			Daily *
		Enter	Exit	Total	Enter	Exit	Total	
Domiciliary Care	155 Beds (141 Suites)	10	5	15	7	10	17	236

Notes: \*Daily traffic volumes were determined based on the estimated number of staff trips, deliveries, and visitors, as described in the Applicant's Statement of Operations.  
 \*\*Peak hour volumes were determined based on the assumption that 6.3% and 7.2% of daily total traffic would occur during the weekday AM and PM peak hours, respectively, as published in the January 2015 ITE Journal article, *Hourly Variation in Trip Generation for Office and Residential Land Uses*. The enter/exit split was assumed as 65%/35% for the weekday AM peak hour and 44%/56% for the PM peak hour, based on data published in the ITE *Trip Generation Manual, 9<sup>th</sup> Edition* for the Assisted Living (#254) land use category.

Mr. Scott Dunn, the Petitioner's expert in traffic engineering, testified that Staff's estimate of the number of trips that will be generated by the proposed use is higher than the LATR rate because Staff based their estimate on information provided by the client. He pointed out that the trip generation rates contained in the Appendix of the LATR guidelines are actually lower. Under the LATR Guidelines, the proposed use would generate five morning peak hour trips and 10 evening

peak hour trips.<sup>3</sup> T. 56. Both Staff's estimate and his estimate are below the 30-trip minimum for requiring a traffic study. T. 57.

## **2. Other Facilities**

Mr. Vest testified that all utilities are available to the site, including water, sewer, gas, telephone, telecommunication and electric. Underground water will circulate through the building for fire protection. The use will not have an impact on schools, and police and fire facilities are available to serve the use. T. 53-54.

## **H. Community Response**

Mr. Dan Wilhelm appeared at the hearing in support of the revised application. He submitted a letter into the record stating that the revised plan was acceptable to the Greater Colesville Civic Association (GCCA). Exhibit 44. Previously, GCCA opposed the petition because of the height and scale of the building and the waiver of the setback along the southern property line. Exhibit 48, Attachment 1. Other property owners expressed similar concerns about the size of the project and its impact on the character of the area, as well as traffic safety. *Id.*, Attachment 2.

## **III. SUMMARY OF TESTIMONY**

The Petitioner presented expert testimony from Mr. Roach, an expert in land planning and architecture, Mr. Bill Vest, an expert in civil engineering, and Mr. Scott Dunn, transportation engineer. Mr. Daniel Wilhelm testified on behalf of the Greater Colesville Civic Association. Their testimony is set forth herein where relevant.

---

<sup>3</sup> The *LATR Guidelines* do permit trip generation estimates based on submitted statements for *nursing homes*, but not explicitly for independent living facilities. *LATR Guidelines*, Appendix A, Table A-7. Because both trip generation rates estimates are below 30 trips, the Hearing Examiner need determine which calculation is correct.

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

##### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and



non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a domiciliary care home (*i.e.*, domiciliary care facility). Characteristics of the proposed domiciliary care home that are consistent with the “necessarily associated” characteristics of domiciliary care homes will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with domiciliary care homes, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff described the physical and operational characteristics necessarily associated with a domiciliary care home as follows (Exhibit 48, p. 14):

- 1) Physical buildings and structures, as well as outdoor passive areas for the residents and visitors;
- 2) lighting;
- 3) traffic to and from the site by staff, visitors and residents;
- 4) deliveries of supplies and trash pick-up;
- 5) parking areas;
- 6) noise associated with garbage pick-up and normal deliveries to individual residents.

To this description, the Hearing Examiner would add that one would expect a domiciliary care home to produce some noise generated by equipment for the facility, such as the generator, by food service deliveries, and by occasional outdoor activities of residents and their families. The Hearing Examiner believes that these factors are inherent in all domiciliary care homes, by their nature, although their impact will vary significantly according to the nature of the domiciliary care

home, its size and its location.

In the subject case, because the residents will be elderly and unlikely to drive, a relatively small amount of additional traffic will be generated, mostly by staff and visitors. Technical Staff found there would be no non-inherent impacts of the proposed use because the site is well located to access services needed by residents, adequate parking is available to visitors and employees, trash removal will occur once or twice a week between 7:00 a.m. and 7:00 p.m., and food deliveries will take place in the afternoon. Staff also found that the facility is compatible with the surrounding area and serves as a transitional use between New Hampshire Avenue and the single-family detached neighborhood to the north and west. Exhibit 48, p. 15. The Hearing Examiner agrees with Technical Staff that the use is compatible with the neighborhood and further finds that the reduced scale of the building is not excessive and is well buffered visually by setbacks and landscaping. As a result, she finds that there are no non-inherent impacts associated with this petition.

### **B. General Conditions**

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the testimony and exhibits of the Petitioner provide ample evidence that the general standards would be satisfied in this case.

#### **Sec. 59-G-1.21. General conditions.**

**§5-G-1.21(a)** *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: A domiciliary care home is a permissible special exception in the R-200 Zone, pursuant to §59-C-1.31 of the Zoning Ordinance.

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and*

*requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.37 for a domiciliary care home, as outlined in Part IV.C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject site lies within the geographic area covered by the 1997 White Oak Master Plan, discussed at length in Part II. D of this Report. The Hearing Examiner agrees with Technical Staff's conclusion that the development will be consistent with the guidelines for special exceptions contained in the Plan, both because the alignment of the building (with the narrow side facing New Hampshire Avenue) and the reduction in height make the scale more compatible with the surrounding community. The building's residential articulation contributes to reducing the building's mass. No parking areas are located in the front yard facing New Hampshire Avenue, the institutional or commercial character of the parking areas are well screened from neighboring properties by landscaping and, along the southern property line, the board on board fence. She also finds that the petition is consistent with Plan's goal to meet the need for senior housing in the area.

While the Plan discourages an overconcentration of special exceptions along New Hampshire Avenue, the Petitioner has demonstrated that there are only two other special exceptions in the area: an accessory apartment and a related facility for assisted living/memory care, which Mr. Roach testified would complement the services provided on this property.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: Technical Staff concluded that the use will be in harmony with the general character of the neighborhood because “the proposed three- and four-story building will be residential in character, and will be set back 131 feet from New Hampshire Avenue.” Exhibit 48, p. 16. Staff also concluded that the building’s residential articulation, varied roofline, and landscaping will render it compatible with the surrounding residential area. The Hearing Examiner agrees that these will significantly mitigate any impacts from the use on the adjacent single-family homes. In addition, the relatively small number of peak hour trips generated by the facility will not have a significant impact on nearby roadways.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the same findings for General Standard 4, above, there is no evidence that the use, as proposed, will be detrimental to the peaceful enjoyment of surrounding properties.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Trash and food service deliveries will be limited to daytime hours and illumination from the use will be 0.0 footcandles at all property lines. Lighting will utilize shielded fixtures to direct the light downward without significantly illuminating the building. Given the limited outdoor activities of the residents, the Hearing Examiner finds that the above standard has been met.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number,*

*intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff described the surrounding area as consisting of a number of non-residential, institutional uses along New Hampshire Avenue with single-family detached neighborhoods to the rear, and Mr. Roach's testimony is to the same effect. At present, there are only two special exceptions in the surrounding area, an accessory apartment, which is a small-scale residential use, and the Petitioner's related assisted living facility located on the northern side of the Cambodian Buddhist temple. Given the small-scale, residential nature of the accessory apartment and the related use of the assisted living facility, the Hearing Examiner finds that the proposed use will not result in an overconcentration of special uses in the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: There is no evidence in this record that the use would adversely affect the safety and welfare of surrounding residents. Staff analyzed the safety of the access requiring U-turns and concluded there was sufficient storage for the number of vehicles expected to utilize these turns, and SHA advised Staff that there are no significant operational concerns along this stretch of New Hampshire Avenue.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*
- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*

- (i) *does not require approval of a new preliminary plan of subdivision; and*
- (ii) *the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact; then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would require approval of a preliminary plan of subdivision. Therefore, the adequacy of public facilities will be determined by the Planning Board at subdivision, and approval of the preliminary plan of subdivision is a recommended condition in Part V of this report, as required by this section of the Zoning Ordinance. Nevertheless, the evidence, which is discussed in Part II.F of this report, supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities.

*(C) With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: In response to safety concerns raised by the community, Staff analyzed whether the need to make U-turns to enter and exit the facility would reduce vehicular safety along New Hampshire Avenue. Staff's conclusion that there is sufficient storage at each of the intersection where U-turns would be necessary is unrefuted. In addition, SHA reported that there are no operational or safety issues along this stretch of New Hampshire Boulevard. Having no evidence to the contrary, the Hearing Examiner finds that the proposed development will not reduce the safety of vehicular or pedestrian traffic.



### C. Specific Standards

The testimony and the exhibits of record (including the Technical Staff Report, Exhibit 48) provide sufficient evidence that the specific standards required by Section 59-G-2.37 are satisfied in this case, as described below.

#### **Sec. 59-G-2.37. Nursing home or domiciliary care home.**

*(a) A nursing home of any size, or a domiciliary care home for more than 16 residents (for 16 residents or less see “Domiciliary care home”) may be allowed if the board can find as prerequisites that:*

*(1) the use will not adversely affect the present character or future development of the surrounding residential community due to bulk, traffic, noise, or number of residents;*

Conclusion: This specific standard is essentially a summary of the general standards 4, 5 and 6, above. For the reasons discussed therein, the Hearing Examiner finds that the use will not adversely affect the present character or future development of the surrounding residential community due to bulk, traffic, noise, or number of residents.

*(2) the use will be housed in buildings architecturally compatible with other buildings in the surrounding neighborhood; and*

Conclusion: Petitioner’s architect testified that the reduced scale, lowering the height fronting New Hampshire Avenue, render the bulk and scale of the building compatible with the single-family homes in the area. The Hearing Examiner finds that the articulation shown on the elevations (Exhibit 42(f)), which include gabled roofs and dormers, as well as the differing roof planes, give the building a residential character. The Hearing Examiner finds that the proposed use will be architecturally compatible with other buildings in the neighborhood.

*(3) the use will be adequately protected from noise, air pollution, and other potential dangers to the residents.*

Conclusion: The Hearing Examiner finds that the dedicated sidewalk surrounding much of the building, provide a protected environment for residents. Food service and trash deliveries will be during daytime hours. The 10-foot shared use path that will replace the existing substandard sidewalk will improve traffic safety.

*(4) The Board of Appeals may approve separate living quarters, including a dwelling unit, for a resident staff member within a nursing home or domiciliary care home.*

Conclusion: Not applicable. Petitioner proposes no resident staff employees.

*(b) The following requirements must apply to a nursing home housing 5 patients or less:*

\* \* \*

Conclusion: Not applicable. The proposed facility is not a nursing home and will not have patients.

*(c) The following requirements apply to all new nursing homes, additions to existing nursing homes where the total number of residents is 6 or more, and to all domiciliary care homes for more than 16 residents.*

*(1) The minimum lot area in the rural zone must be 5 acres or 2,000 square feet per bed, whichever is greater.*

Conclusion: Not applicable. Subsection (1) applies only to rural zones.

*(2) In all other zones, the minimum lot area must be 2 acres or the following, whichever is greater:*

*a. In the RE-2, RE-2C, RE-1 and R-200 zones, 1,200 square feet for each bed.*

*b. In the R-150, R-90, R-60 and R-40 zones, 800 square feet for each bed.*

*c. In the R-T, R-30 and R-20 zones, 600 square feet for each bed.*

*d. In the R-10, R-H, C-O, C-T and C-2 zones, 300 square feet for each bed.*

*e. In the town sector and planned neighborhood zones, 800 square feet per bed.*

Conclusion: Because the property is within the R-200 Zone, the lot area must have 1,200 square feet per bed. The property is approximately 4.6 acres or 200,376 square feet. Petitioner proposes 155 beds, which is approximately 1,293 square feet per bed, meeting this standard.

*(3) Minimum side yards are those specified in the zone, but in no case less than 20 feet.*

Conclusion: The building will be set back approximately 61 feet from the southern lot line and 30 feet from the northern lot line, meeting this requirement.

*(4) Maximum coverage, minimum lot frontage, minimum green area, minimum front and rear yards and maximum height, are as specified in the applicable zone.*

Conclusion: According to Technical Staff, the proposed facility will meet all applicable standards for the R-200 Zone as discussed more fully in Part IV.D of this Report, below. Exhibit 48, p. 22,

*(d) Off-street parking must be provided in the amount of one space for every 4 beds and one space for 2 employees on the largest work shift, except the board may specify additional off-street parking spaces where the method of operation or type of care to be provided indicates an increase will be needed.*

Conclusion: Petitioner proposes 155 beds and a condition of approval will limit the largest work shift to 10 employees. This would require 39 spaces for beds ( $155 \text{ beds} / 4 = 38.75$ ) and 5 spaces for employees ( $10 \text{ employees} / 2 = 5$ ) for a total of 44 spaces. The special exception site plan shows 93 spaces, four of which are ADA van accessible, meeting this requirement.

*(e) An application must be accompanied by a site plan, drawn to scale, showing the location of the building or buildings, parking areas, landscaping, screening, access roads, height of buildings, topography, and the location of sewers, water lines, and other utility lines. The site plan must also show property lines, streets, and existing buildings within 100 feet of the property, and indicate the proposed routes of ingress and egress for automobiles and service vehicles. A vicinity map showing major thoroughfares and current zone boundaries within one mile of the proposed home, must be included.*

Conclusion: Petitioner has provided a Site Plan meeting these requirements, the final version of which is Exhibit 61(a).

*(f) An application for a special exception for this use must include an expansion plan showing the location and form of any expansions expected to be made in the future on the same site.*

Conclusion: Not applicable. Petitioner is not proposing any expansions in the future. Exhibit 48, p.

22. Any future expansions would require a modification of this special exception.

*(g) Any nursing home, or domiciliary care home for more than 16 residents lawfully established prior to November 22, 1977, is not a nonconforming use, and may be extended, enlarged or modified by special exception subject to the provisions set forth in this section.*

Conclusion: Not applicable.

*(h) Any application for nursing home and/or care home which is pending at the Board of Appeals as of February 24, 1997 at the request of the Petitioner, may be processed under the applicable provisions of the Zoning Ordinance in effect at the time the application was filed.*

Conclusion: Not applicable.

#### **D. Additional Applicable Standards**

##### **Section 59-G-1.23. General development standards.**

*(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: A table from the Staff Report (Exhibit 48, p. 18), shown on the following page, demonstrates compliance with all applicable development standards.

*(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As discussed above, the applicable parking standards for the number of parking spaces have been met. Requirements for setbacks, shading and landscaping of parking facilities provided for in Article 59-E have also been met, as evidenced by the revised site plan (Exhibit (42(b))).

*(c) Minimum frontage \* \* \**

Conclusion: Not applicable, since none of the listed uses are involved and no waiver is being sought.

Development Standards	Required/Permitted	Proposed
Minimum Lot Area	20,000 sq. ft.	194,094 sq. ft.
Minimum Lot Width		
--at front building line	75 ft.	295 ft.
--at street line	25 ft.	295 ft.
Minimum Setback from Street (59-G-2.35(c)(1))	50 ft.	131 ft.
Minimum Setback from Adjoining Lot		
--side lot line	12 ft.	30 ft.
--sum of both sides	25 ft.	91 ft.
--rear lot line	30 ft.	114 ft.
Maximum Building Height	50 ft.	47 ft., 8 inches
Maximum Building Coverage	25%	24.8%
Required Parking Spaces (Auto)	44	93
Required Bicycle Parking	5	6
Required Motorcycle Parking	2	2

**Comparison of Minimum and Proposed  
Development Standards  
Exhibit 48, p. 18**

*(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: The Planning Board has approved a Preliminary Forest Conservation Plan for the development. T. 52. The following condition has been recommended in Part V of this report:

The proposed development must comply with the conditions of the Preliminary Forest Conservation Plan (Exhibit 42(i)), until approval of the Final Forest Conservation Plan by the Planning Board, after which time Petitioner must comply with the terms of the Final Forest Conservation Plan.

*(e) Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the Petitioner, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: This requirement is not applicable because the subject site is not in a special protection area.

(f) *Signs. The display of a sign must comply with Article 59-F.*

Conclusion: Petitioner proposes a sign at approximately the mid-point of the property's frontage on New Hampshire Avenue, just north of the access drive. Technical Staff advises that the sign meets the standards of Article 59-F. The Hearing Examiner recommends the following condition in Part V of this report:

Petitioner must obtain a permit for the proposed sign, and a copy of the permit for the approved sign must be submitted to the Board of Appeals before the sign is posted. If required by the Department of Permitting Services, Petitioner must obtain a sign variance for the proposed sign or amend the design of the proposed sign to have it conform to all applicable regulations. If the design is amended, a diagram showing the amended design must be filed with the Board.

(g) *Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: As mentioned above, Technical Staff and the Hearing Examiner concluded that the residential character of the subject site will be maintained, given the architectural design of the planned structure, and its setting, setbacks and landscaping. It will thus be compatible with the neighborhood.

(h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*



(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: The Petitioner's architect testified that the proposed wall- and pole-mounted light fixtures will not cause glare on adjoining properties, nor exceed the 0.1 foot-candle standard along the property lines, which is supported by the photometric study. He further testified that the building will not be awash with light. Having no evidence to the contrary, the Hearing Examiner finds that the proposed lighting meets the above standard.

**Section 59-G-1.26. Exterior appearance in residential zones.**

*A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.*

Conclusion: As discussed above, the planned structure will have a residential appearance and will be appropriately landscaped and screened. Technical Staff advises that vehicular and pedestrian circulation are safe and adequate. The Hearing Examiner finds that this standard has been met.

Based on the record in this case, the Hearing Examiner concludes that Petitioner has satisfied the general and specific requirements for the special exception it seeks. In sum, the domiciliary care home use proposed by Petitioner should be granted, subject to the conditions set forth in Part V of this report.

**V. RECOMMENDATION**

Based on the foregoing analysis, I recommend that Petition No. S-2882, seeking a special exception to permit establishment and use of a domiciliary care home at 13716 New Hampshire Avenue, Silver Spring, Maryland, be GRANTED, with the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and the representations of its counsel identified in this report.
2. The maximum allowable number of beds must not exceed one hundred fifty-five (155);
3. The maximum number of employees on-site at any one time must not exceed ten (10);
4. Trash pick-up is limited to a maximum of two times per week between the hours of 7:00 a.m. and 7:00 p.m. Food service deliveries must occur during afternoon hours.
5. The Petitioner must obtain approval of a Preliminary Plan of Subdivision per Chapter 50 of the Montgomery County Code; if changes to the site plan or other plans filed in this case are required at subdivision, Petitioner must file a copy of the revised site and related plans with the Board of Appeals.
6. All use and development of the property must comply with Petitioner's site plan (Exhibits 61(a) and 59(c)), Landscape Plan (Exhibits 59(i) and (j)), and Lighting Plan (Exhibits 42(g) and (h)). The fence along the southern property shall be made of wood.
7. Petitioner must obtain a permit for the proposed sign, and a copy of the permit for the approved sign must be submitted to the Board of Appeals before the sign is posted. If required by the Department of Permitting Services, Petitioner must obtain a sign variance for the proposed sign or amend the design of the proposed sign to have it conform to all applicable regulations. If the design is amended, a diagram showing the amended design must be filed with the Board.
8. The proposed development must comply with the conditions of the Preliminary Forest Conservation Plan (Exhibit 59(g)), until approval of the Final Forest Conservation Plan by the Planning Board, after which time Petitioner must comply with the terms of the Final Forest Conservation Plan.
9. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special

exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: November 10, 2015

Respectfully submitted,

A handwritten signature in dark ink, consisting of a stylized 'L' and 'R' followed by a long horizontal flourish.

Lynn A. Robeson  
Hearing Examiner